UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs, v. PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD, Defendants.	Civil Action No. 11-cv-99

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Nuclear Regulatory Comm'n:

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Generic Environmental Impact Statement for License Renewal of Nuclear Plants – Final Report, NUREG-1437, Supp. 30, Vol. 1 (Aug. 2007), *available at*http://pbadupws.nrc.gov/docs/ML0720/ML072050012.pdf.....8

Generic Environmental Impact Statement for License Renewal of Nuclear Plants – Main Report, NUREG-1437, Vol. 1 (May 1996), *available at*http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/v1/index.html#pub-info 7

The Fiscal Year 2012 Department of Energy and Nuclear Regulatory Commission Budget (Mar. 17, 2011), *available at* http://www.nrc.gov/about-nrc/organization/commission/comm-gregory-jaczko/0317nrc-transcript-jaczko.pdf.....11

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2A N. Singer & J. Singer, *Sutherland Statutory Construction* (7th ed. 2007).....12

INTRODUCTION

When Plaintiff Entergy Nuclear Vermont Yankee, LLC ("ENVY") purchased the Vermont Yankee ("VY") nuclear power plant in 2002, it knew that: (1) the plant was authorized to operate only until March 21, 2012, and (2) ENVY would need additional approval from the State to continue operating beyond that date. ENVY "expressly and irrevocably" agreed that "the [Vermont Public Service] Board has jurisdiction under current law to grant or deny approval of operation of the [VY facility] beyond March 21, 2012," and further agreed to "waive any claim [it] may have that federal law preempts the jurisdiction of the Board." For years afterwards, ENVY has actively participated in regulatory and legislative proceedings without asserting preemption. ENVY's complete about-face is unpersuasive. And equity bars its preemption arguments.

ENVY's preemption arguments have no merit. ENVY must overcome the well-established presumption against preemption, which applies with particular force where, as here, there is a long history of state regulation of the subject matter at issue. In the Atomic Energy Act, Congress expressly preserved "the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). Both the Supreme Court and the Nuclear Regulatory Commission ("NRC") have recognized that states have broad authority over numerous issues related to nuclear power plants, including non-radiation safety issues, reliability, the need for additional generating capacity, the mix of power sources in a state, plant siting, land use, and aesthetics. Neither Act 74 nor Act 160 addresses radiological safety; they simply require ENVY to obtain legislative authorization to operate beyond March 12, 2012. The statutes set forth the Legislature's reasonable, non-preempted concerns, such as ensuring that Vermont's future power supply would be "diverse, reliable, economically sound, and environmentally sustainable." The legislative history, assuming it is

even relevant, reflects those legitimate interests.

Although the statutory text is sufficient to defeat Entergy's preemption claim, at trial the State's three experts will provide additional evidence to rebut Entergy's assertion of legislative "pretext."

- Peter Bradford, drawing on decades of experience as a federal and state regulator, will describe other states' regulatory efforts and explain that the objectives Vermont pursued here are both reasonable matters for state concern and consistent with the energy policies of other states.
- William Steinhurst, who has deep experience with Vermont's energy planning, will testify that energy diversity, land use, economics, and promoting clean, renewable energy have been part of Vermont's energy policy objectives for decades, and that closing Vermont Yankee is consistent with those objectives.
- Bruce Hinkley, a nuclear engineer, participated in the Act 189 review process and will explain how the State's legitimate concern focused on plant reliability.

ENVY's claims for declaratory and injunctive relief not only fail on the merits, but also are barred by waiver, estoppel, and other equitable doctrines. ENVY "expressly and irrevocably" agreed in 2002 that it would not challenge the State's jurisdiction to determine whether the VY facility should operate beyond March 21, 2012. For nearly a decade, ENVY has repeatedly represented to State officials and federal courts that it would not challenge the State's authority in determining whether to allow VY to operate beyond the expiration of its current Certificate of Public Good ("CPG"). Having obtained the *benefits* of numerous state actions — all the while committing to state regulatory authority — ENVY may not reverse course and assert that the State's law is preempted.

LEGAL STANDARD

Preemption analysis begins with a "presumption against federal preemption of a state law," *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 93 (2d Cir. 2006), *aff'd*, 552 U.S. 440 (2008), that applies to "all pre-emption cases," *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quotations omitted). The burden here is on ENVY "to show that Congress intended to preclude" the state laws in question. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

ENVY bears a particularly heavy burden here because it seeks to displace state law in an area traditionally regulated by the states. The Supreme Court has long recognized that nuclear power plants are subject to "dual regulation" and that states have a critical role in licensing and regulating those facilities. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 210-12 (1983) ("*PG&E*"). Although the federal government has assumed exclusive control over "the radiological safety aspects" of nuclear energy generation, "[s]tates retain their traditional responsibility" in regulating electrical utilities to determine "questions of need, reliability, cost, and other related state concerns." *Id.* at 205. Because preemption here would interfere with traditional state police powers, a court may not find preemption "unless that was the *clear and manifest purpose of Congress*." *Id.* at 206 (emphasis added; quotations omitted); *see English v. Gen. Elec. Co.*, 496 U.S. 72, 86 (1990) (state law not within "pre-empted field of nuclear safety" absent "evidence of a 'clear and manifest' intent on the part of Congress to pre-empt").

ARGUMENT

I. FEDERAL LAW DOES NOT PREEMPT THE CHALLENGED STATUTES

A. States Retain Substantial Authority To Regulate Nuclear Power Plants, Including Merchant Generators

The Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, makes clear Congress did not intend to

encroach upon states' traditional role as utility regulators. Section 271 of the Act provides:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the [NRC]: *Provided*, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the [NRC].

42 U.S.C. § 2018. Section 274(k) further provides: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." *Id.* § 2021(k).

The Supreme Court has construed those provisions to mean that Congress "intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." *PG&E*, 461 U.S. at 205. Accordingly, the Atomic Energy Act preempts state law only when the challenged laws have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 496 U.S. at 85.

By expressly permitting state regulation "for purposes other than protection against radiation hazards," 42 U.S.C. § 2021(k), Congress "underscored the distinction drawn in [the Atomic Energy Act] between the spheres of activity left respectively to the Federal Government and the States." *PG&E*, 461 U.S. at 210. Indeed, the NRC has no authority *at all* over "the generation of electricity itself, or over the economic question whether a particular plant should be built," and the savings clauses eliminate "[a]ny doubt that ratemaking and plant-need questions were to remain in state hands." *Id.* at 207-08. Thus, states may "exercise their traditional authority over the need for additional generating capacity, the type of generating

facilities to be licensed, land use, ratemaking, and the like." *Id.* at 212.

The petitioner in *PG&E* raised arguments very similar to those that ENVY advances here, contending that the state laws in question — which banned construction of new nuclear plants in California until adequate storage facilities were available for nuclear waste — were "written with safety purposes in mind." *Id.* at 215. The Court, however, concluded that the legislative history was "subject to varying interpretation[s]," and "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.* at 216. The Court refused to "become embroiled in attempting to ascertain California's true motive" and "accept[ed] California's avowed economic purpose as the rationale" for enacting the statute. *Id.* Regardless of any policy arguments about the merits of nuclear power — like those ENVY advances here — "the legal reality remains that Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons," and "it is for Congress to rethink [that] division of regulatory authority" if necessary. *Id.* at 223.

Importantly, the Court found the California laws at issue not to be preempted even though they unquestionably touched on safety-related issues. "There are *both safety and economic* aspects to the nuclear waste issue: first, if not properly stored, nuclear wastes might leak and endanger both the environment and human health; second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor shutdowns, rendering nuclear energy an unpredictable and uneconomical adventure." *Id.* at 196-97 (emphasis added; footnote omitted). The absence of a long-term plan for disposing of nuclear waste may *both* endanger human health *and* "affect[] the economic attractiveness of the nuclear option." *Id.* at 197 n.6. The California laws at issue were "responses to these concerns,"

id. at 197, and thus legitimately motivated by economic concerns, *id.* at 205-16.[1]

Although ENVY insists that state regulatory authority is more limited because VY is a merchant generator, nothing in the Atomic Energy Act or NRC regulations so limits state authority. The Federal Power Act expressly reserves state authority to regulate *all* generating facilities. *See* 16 U.S.C. § 824(b)(1); *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (states retain "right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission"). There is no statutory basis for ENVY's "merchant generator" argument. And, to the extent ENVY asserts that the State has no plausible reason to regulate an in-state merchant plant, it is mistaken. Issues like land use, aesthetics, tourism, and economics are relevant to any major generating facility. Moreover, as Mr. Bradford will explain and other evidence will show, legislators reasonably expected that, if VY continued operations after March 2012, it would sell a substantial fraction of its power to Vermont utilities. ENVY actively promoted that expectation, telling legislators that it was undertaking all efforts to reach a power purchase agreement with those utilities. That alone provided a reasonable basis for the Legislature to consider a broad range of issues related to VY's continued operation.[2]

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[1] The Court has also upheld other state laws that indisputably touched on matters related to radiological safety. *See Silkwood*, 464 U.S. at 248-58 (holding that state-law punitive damage claims for radiation-related injuries were not preempted); *English*, 496 U.S. at 88-89 (holding that state-law tort claims for intentional infliction of emotional distress brought by employee who faced retaliation after reporting radiation-related safety concerns were not preempted).

[2] The fact that ENVY did not reach an agreement with the utilities is irrelevant to the preemption issue. The crucial inquiry is not whether the Legislature adopted correct reasoning or made accurate predictions, but whether the statute conflicts with federal law or encroaches on a preempted field.

Finally, the fact that ENVY possesses an NRC license does not immunize the plant from state law. Indeed, the NRC's own regulations make clear that, even after the NRC approves a license renewal, "the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers." Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,473 (June 5, 1996). That final decision "will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction." *Id.* In particular, "the determination of the economic viability of continuing the operation of a nuclear power plant is an issue that should be left to appropriate State regulatory and utility officials." *Id.* at 28,471; *see also* 10 C.F.R. § 51.71(f) n.4.

The NRC has noted further that "a license renewal application could satisfy the NRC's safety and environmental reviews and still not operate," because "the NRC does not have a role in the energy-planning decisions of state regulators and licensing officials." NRC, *Frequently Asked Questions on License Renewal of Nuclear Power Reactors – Final Report* § 1.2.10 (Mar. 2006). Whether the facility will continue to operate "is based on factors such as the need for power or other matters within the state's jurisdiction or the financial interests of the owners." *Id.*; *see also id.* § 1.2.9 (NRC license is "one of a number of conditions," and it is up to the "state" and others to decide if operations continue).

The NRC has repeatedly reaffirmed that state regulatory agencies will "ultimately decide" whether nuclear power plants continue to operate after a federal license is renewed.[3]

[3] NRC, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants – Main Report*, NUREG-1437, Vol. 1, § 1.3 (May 1996). ENVY thus erroneously suggests, as it has done repeatedly in this proceeding, that there is a meaningful distinction between state authority to approve construction of *new* nuclear power plants and state authority to approve the *continued* operation of existing plants. Mr. Bradford will describe how other states with energy

And it reiterated these points regarding VY's license renewal: "[T]he NRC does not have a role in the energy-planning decisions of State regulators and utility officials as to whether a particular nuclear power plant should continue to operate."[4] The NRC's reasoned interpretations of the Atomic Energy Act are entitled to *Chevron* deference. *See, e.g.*, *City of Cleveland v. NRC*, 68 F.3d 1361, 1367-68 (D.C. Cir. 1995). The Court should accordingly reject ENVY's position that the NRC's renewal of a license precludes states from conducting their own review of the ongoing need for a nuclear power plant.

B. Acts 74 and 160 Are Not Preempted

Like the California statutes upheld in *PG&E*, Act 74 and Act 160 were enacted for legitimate regulatory purposes unrelated to radiological safety.[5] The Legislature sought to further its non-preempted objectives related to, among other things, energy planning, the transition to clean, renewable energy sources, and economics. Nothing in the text of either act regulates radiological safety.

1. Act 74. On June 21, 2005, the General Assembly passed Act 74, which directly responded to ENVY's need for additional spent nuclear fuel storage and helped move the State

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policies similar to Vermont have taken steps that led to the closing of existing plants or the cancelling of planned new facilities.

[4]NRC, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants – Final Report*, NUREG-1437, Supp. 30, Vol. 1, § 1.4 (Aug. 2007); *see also PG&E*, 461 U.S. at 207 n.18 ("States retain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as a lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site.") (quotations and alteration omitted); ENVY's License Renewal, App. E at 1-1 (Jan. 25, 2006) (need for power is assessed "by State, utility, and, where authorized, Federal (other than NRC) decision makers").

[5] The Atomic Energy Act does not contain an express private right of action. Although the Second Circuit has held that a party may bring an action directly under the Supremacy Clause to assert that a state law is preempted, *see Air Transport Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 221-22 (2d Cir. 2008) (per curiam), the Supreme Court has recently agreed to consider that question. *See Douglas v. Independent Living Ctr. of S. California, Inc., et al.*, Nos. 09-958 & 10-283 (to be argued Oct. 3, 2011). Vermont therefore reserves the right to argue that ENVY lacks a private right of action for its preemption claims.

toward a more diverse energy portfolio that would focus on renewables. Without Act 74, VY would have exhausted its storage capacity by 2008 and been forced to cease operating. Act 74 — which ENVY proposed and for which it lobbied — granted ENVY legislative approval to seek a CPG for an expanded dry-cask storage facility, but provided that ENVY may not store spent fuel generated after March 21, 2012 (and thus operate) absent further legislative approval.

In passing Act 74, the General Assembly emphasized that the power produced by VY would eventually "need to be replaced" and that "there is a need for a clean energy development fund to support investment in clean energy resources in order to permit adequate power supply diversity." 2005 Vt. Acts & Resolves No. 74 ("Act 74"), § 2 (Vt. Stat. Ann. tit. 10, § 6521(2), (7) (Findings)). The statute's overall purpose ensures that the state's "future power supply" would be "diverse, reliable, economically sound, and environmentally sustainable." *Id*. (Vt. Stat. Ann. tit. 10, § 6521(3) (Findings)). To advance those goals, Act 74 was passed simultaneously with a Memorandum of Understanding ("MOU") in which ENVY agreed to fund a Clean Energy Development Fund that would promote the development of non-nuclear clean energy. *See* MOU at 2 (¶ 11) (June 21, 2005). Indeed, the support of non-nuclear clean energy was *integral* to Act 74's passage; the statute required "substantial compliance with any [MOU] entered between the state and [ENVY]" before the PSB could grant ENVY its CPG for the additional storage space. Act 74, § 2 (Vt. Stat. Ann. tit. 10, § 6522(b)(4)).

Act 74's express statutory purpose of promoting "diverse, reliable, economically sound, and environmentally sustainable" sources of power falls comfortably within the State's regulatory authority over questions of "need, reliability, [and] cost," the "type of generating facilities to be licensed," and "land use," *PG&E*, 461 U.S. at 205, 212; *see also id.* at 216 (deferring to "avowed" purpose of challenged legislation for purposes of preemption analysis).

Act 74 does not regulate "radiation hazards," 42 U.S.C. § 2021(k), and specifies that all actions taken pursuant to the bill must comply with "any order or requirement of" the NRC, Act 74, § 2 (Vt. Stat. Ann. tit. 10, § 6522(c)(2)) — the entity that *is* responsible for radiological safety.

2. Act 160. On May 18, 2006, the General Assembly passed Act 160, which requires legislative approval before the PSB may grant or deny a petition to renew a CPG for a nuclear power plant. That statute requires ENVY to obtain legislative approval — in addition to the Act 74 approvals — for continued operation after its current CPG expires on March 21, 2012. The explicit "legislative policy and purpose" section of Act 160 provides that the statute furthers "the policy of the state" by allowing the legislature carefully to evaluate Vermont's "need for power, the economics and environmental impacts of long term storage of nuclear waste, and choice of power sources among various alternatives." 2006 Vt. Acts & Resolves No. 160, § 1(a). Act 160 neither mentions nor regulates radiological safety.

ENVY has relied heavily on one sentence of Act 160 that mentions — in a long list of issues that should be studied by the PSB — "public health issues." Vt. Stat. Ann. tit. 30, § 254(b)(2)(B). Those three words hardly demonstrate a prohibited purpose. *First*, numerous "public health" issues entirely unrelated to radiological safety fall well within the State's regulatory authority, such as air emissions from diesel generators and discharges into drinking water. *See* Defs.' Ex. 1006 at 9-3 to 9-4. Indeed, the Clean Air Act expressly preserves state authority "to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent" than the federal standard. 42 U.S.C.§ 7412(d)(9). Similarly, the NRC and Federal Emergency Management Agency have worked closely with the states in addressing

nuclear-related public health issues such as emergency preparedness. *See* 10 C.F.R. § 50.47(a)(2).[6]

Second, the object and policy of Act 160 is found in the "legislative policy and purposes" section, not in one line from a later section of the bill. *See PG&E*, 461 U.S. at 216 (deferring to "avowed" purpose of challenged legislation). Indeed, state laws that have been found preempted have uniformly specifically addressed radiological safety concerns in multiple places.[7]

Third, to the extent the term "public health" is ambiguous about whether it encompasses radiological safety, it should be construed to refer to permissible legislative purposes, both because of the presumption against preemption, *see Wyeth*, 129 S. Ct. at 1194-95, and the more general principles of constitutional avoidance, *see Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (adopting "narrowing construction" of state statute to "avoid[] constitutional difficulties").

C. ENVY's Reliance on Legislative History To Support Its Preemption Claim Is Legally and Factually Flawed

In determining preemption, courts "must judge by [the] results" of the legislative process — the enacted text — "not by the varied factors which may have determined legislators' votes." *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949); *see, e.g., United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). Although the text and "avowed" purpose of laws best reflect legislative intent, *PG&E*,

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[6] *See also* NRC, *The Fiscal Year 2012 Department of Energy and Nuclear Regulatory Commission Budget*, at 25 (Mar. 17, 2011) (NRC Chair noting that the NRC "defer[s] to state and local governments" to establish radius in which potassium iodine tablets should be distributed if there is a contamination event).

[7] *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1229 (10th Cir. 2004) (invalidating licensing scheme where "applicant must provide . . . health risk assessments . . . [and] a radiation safety program, . . . demonstrate that the facility 'will not cause or contribute to an increase in mortality, an increase in illness, or pose a present or potential hazard to human health or the environment,' " and pay for potential liability " 'from a reasonably foreseeable accidental release' "); *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 59 (2d Cir. 1984) (noting that "safety concerns pervade the complaint" and that plaintiffs "specifically refer" to "defects" that "will impair the plant's safety").

461 U.S. at 216, ENVY asserts that the objectives and findings in the statutes are dishonest. The *PG&E* Court, however, rejected similar arguments. *See supra* pp. 5-6. The Supreme Court accepted California's "avowed economic purpose" for its moratorium on nuclear plants, and declined to hunt through the legislative record for evidence of the motives of individual legislators. *PG&E*, 461 U.S. at 216.

Hunting through the legislative record is a particularly problematic exercise here. Unlike Congress, the Vermont Legislature does not produce "authoritative" committee reports. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). Testimony and remarks in committee hearings — on which ENVY places great reliance — are typically given little weight as legislative history. *See, e.g., State v. Madison*, 658 A.2d 536, 545 (Vt. 1995) ("[T]he remarks of a witness at a committee hearing are accorded little weight in determining the intent of the legislature in enacting a statute."); 2A N. Singer & J. Singer, *Sutherland Statutory Construction* § 48:10, at 583 (7th ed. 2007) (courts "hesitant" to rely upon statements at committee hearings). And for good reason: these materials shed little light on the intent of the legislators who voted for the laws. Committees may begin looking at an issue with little background and gain knowledge and experience as the process evolves. They hear testimony from a range of witnesses with different perspectives and knowledge, and hearings may focus on early drafts of bills that are substantially different from the final legislation. Only by reviewing a sequence of bill drafts concurrent with committee testimony is it possible to see if testimony even pertains to language that is part of the final statute. While floor debates at least reflect deliberations of all members on the final proposal, the House does not record those debates and at least one key Senate floor debate (on Act 160) was not recorded either. The fact that the Court cannot even review the deliberations of one legislative house confirms ENVY's dubious reliance on legislative history to support

preemption.

Even if legislative history were relevant to the preemption inquiry, that history in fact supports the challenged statutes' constitutionality. The record shows that the Legislature acted for the stated statutory reasons, including energy planning, energy diversity, economics, and the promotion of renewable, environmentally sustainable energy sources. The legislators sought and received guidance about preemption and the limits of state authority and repeatedly acknowledged those limits in their deliberations. Issues related to the safety of VY were certainly *discussed* at times, but that is neither surprising nor a basis for finding preemption. *See PG&E*, 461 U.S. at 196-97 (noting "both safety and economic aspects" to issue).

The State will address the relevant legislative materials at trial and has compiled an appendix that indexes and excerpts the legislative record for Acts 74, 160, and 189, and S.289. The State's experts will provide additional information relevant to the challenged legislation. Mr. Steinhurst will testify about the State's energy planning process and objectives and explain that Vermont has long been focused on energy diversity and the transition to clean, renewable energy sources. These objectives are reflected in energy plans and numerous statutes. While ENVY describes the statutory purposes of Acts 74 and 160 as "implausible," Mr. Steinhurst will testify that closing VY is consistent with those purposes, among others. And Mr. Bradford will testify that Vermont's policy objectives are similar to those pursued by other states.

D. The Vermont General Assembly May Lawfully Participate in Licensing Decisions Regarding the VY Facility

1. State Legislatures May Make Licensing Decisions. ENVY has asserted that it was improper for the Legislature to take an active role in licensing decisions for nuclear power plants. It is not. The petitioners in *PG&E* similarly argued that "there already is a body, the California Public Utilities Commission, which is authorized to determine on economic grounds whether a

nuclear power plant should be constructed" and that the state should have entrusted that decision to the commission, not the legislature. 461 U.S. at 215. The Supreme Court squarely rejected that argument, noting that a state is "not foreclosed" from making licensing decisions "through a legislative judgment" and that "California cannot be faulted for pursuing that course." *Id.* Moreover, Vermont's requirement for legislative approval is hardly unusual. *See, e.g.*, Minn. Stat. Ann. § 216B.243 Subd. 3b(b) (requiring approval from legislature and from public utility commission for additional storage of spent fuel when a nuclear plant seeks a license extension); *PG&E*, 461 U.S. at 198 & n.8 (describing California state legislature's ability to "nullify" state commission finding lifting the moratorium on construction of new nuclear plants).

2. The Senate's Rejection of S.289 Is Irrelevant to the Preemption Analysis. As explained above, Act 74 required ENVY to obtain legislative approval before storing spent fuel generated after March 21, 2012, and Act 160 required legislative approval before the PSB could renew ENVY's CPG beyond its current expiration date of March 21, 2012. A bill introduced in the Senate in February 2010 (S.289) would have granted ENVY the necessary approvals to operate through 2032, but the bill was soundly defeated in the Senate. ENVY has claimed that the legislative history of S.289 supports its arguments that Acts 74 and 160 are preempted. ENVY has also suggested that the Senate vote against S.289 was an impermissible "one house legislative veto." ENVY is wrong on both counts.

a. The Senate rejected S.289 after considering radiation-neutral factors, such as economic issues, alternative energy sources, and public confidence in ENVY and its various corporate affiliates. *See* App. 356–495. Those are all plainly permissible considerations under the Atomic Energy Act and the Supreme Court's decisions interpreting that Act. Indeed, S.289 itself expressly relied upon the state's obligation to plan for its energy future, *see* S.289, § 1(d),

and the need to provide electric utilities enough "time to develop and obtain renewable or other alternative electric energy sources" in the event VY closed in 2012, *id.* § 1(e).

Although ENVY points to occasional references to "safety" in the floor debates over S.289 to suggest that the Senate overwhelmingly rejected S.289 because of concerns about radiological safety, these brief snippets from approximately three hours of debate cannot carry that burden. A statement by a Department of Public Service ("DPS") commissioner about tritium leaks, for instance, *see* App. 451, sheds no light on the thinking of any individual senator, much less the Vermont Senate as a whole. Indeed, to the extent senators discussed the tritium leaks, they did so primarily in the permissible context of assessing whether Entergy had made misrepresentations to the legislature or the PSB. *E.g.*, *id.* at 404. The Atomic Energy Act does not prevent states from evaluating whether a power plant owner is a trustworthy business partner.

ENVY also points to a statement by a Senator who proposed an amendment to S.289 and asserted that "safety concerns" are "certainly in everybody's mind in this room." But a remark by a single legislator cannot taint an entire legislative body with an improper purpose. *See Garcia*, 469 U.S. at 76 ("[w]e have eschewed reliance on the passing comments of one Member and casual statements from the floor debates" in assessing legislative history (citation omitted)). Indeed, if ENVY's position were accepted here, any legislator could make a bill unconstitutional by asserting that other legislators were motivated by radiological safety concerns. That cannot be so. In short, the legislative record and other evidence will show that the Legislature's consideration of VY's relicensing in 2010 focused on legitimate, non-preempted concerns, including a lack of trust in ENVY and skepticism about ENVY's proposed spin-off of VY to Enexus.

b. ENVY also incorrectly asserts that the Senate's rejection of S.289 is analogous to an

impermissible "one house legislative veto" under *INS v. Chadha*, 462 U.S. 919 (1983). *Chadha* involved a statute in which one house of Congress could, with a simple majority vote, nullify an executive branch action "that had the purpose and effect of *altering the legal rights*, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." *Id.* at 952 (emphasis added).

The Vermont Senate's rejection of S.289 is entirely different. Here — as ENVY has known since 2002 — the CPG for operating VY will expire on March 21, 2012, unless it is renewed. Unlike in *Chadha*, the Senate's rejection of S.289 did not alter the status quo; it merely *failed to change* the status quo in a manner favorable to ENVY. Indeed, ENVY's argument proves far too much — if ENVY were correct, then Congress would violate *Chadha* every time it passed a statute with a sunset provision and then one chamber rejected or failed to enact a bill designed to extend the law past its sunset date. *Chadha*, however, expressly noted that "other means of control, *such as durational limits on authorizations* . . . , lie well within Congress' constitutional power." *Id.* at 955 n.19 (emphasis added). And ENVY cannot complain because the House failed to take up S.289. The evidence shows that ENVY actively opposed a House vote on S.289 and lobbied legislators, including the Speaker of the House, not to take up the bill.

In all events, *Chadha* involved the *United States* Constitution. To the extent ENVY seeks to raise a *Chadha*-like claim under the Vermont Constitution, that would involve a pure question of state law that must be brought in state court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (Eleventh Amendment prohibits federal courts from asserting even pendent jurisdiction over state law claims against state officials).

3. The Legislature's Decision Not To Allow Renewal of ENVY's CPG Will Not Affect the Safety of the Decommissioning Process. In its Order denying ENVY's request for a preliminary

injunction, the Court stated that it is unclear "how a legislative scheme that does not require final determination of a renewal petition for a nuclear plant is compatible with the safe decommissioning of a plant." July 18 Order at 3 n.2 (ECF No. 88). Safe decommissioning is of paramount concern. However, the legislative decision not to allow ENVY to seek extension of its CPG does not change the orderly decommissioning process the NRC requires. All plants are required to prepare decommissioning plans and cost estimates, to update those plans regularly, and to be prepared for early shutdown and decommissioning. ENVY's current CPG allows operations for decommissioning after March 21, 2012. At trial, Mr. Hinkley will further explain why the State's review process related to relicensing will not affect safe decommissioning.

4. ENVY's Challenges to Act 189 Fail. ENVY also relies on Act 189, which set up a panel to assess the reliability of VY. That panel began its work in 2008, issued a report to the Legislature on March 17, 2009, and performed some follow-up work in 2010. The panel has now completed its work, and the State has no plans to reconvene it. Thus, any preemption arguments based on Act 189 are moot.

Even if relevant, both the legislative history and the implementation of Act 189 reflect the Legislature's legitimate, non-preempted concern with plant reliability. The Legislative Appendix contains material showing that legislators sought guidance on and acknowledged the limits on state authority. The NRC recognized that reliability was a legitimate state concern and advised Vermont that reliability is not within the NRC's purview. Mr. Bradford and Mr. Hinkley will address the Act 189 review and show that the reliability audit did not intrude on matters within the NRC's sole jurisdiction.

E. ENVY's Claims Under the Federal Power Act and Commerce Clause Fail

ENVY's Federal Power Act and Commerce Clause arguments lack merit. No provision of state law requires ENVY to sell power at below-market rates and ENVY cannot show state

action that discriminates against interstate commerce.[8] ENVY's reliance on the "filed rate" doctrine is misplaced, because ENVY's market-based FERC tariff does not mandate a specific rate, and FERC in any event must approve any power purchase agreement by ENVY. In any event, ENVY's claims would not warrant broad injunctive relief. At most, ENVY would be entitled to an order enjoining the State from requiring VY to sell power at below-market rates, which is the only alleged violation of the FPA and Commerce Clause. *See, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (injunctive relief must be "narrowly tailored to fit specific legal violations") (quotations omitted).[9]

II. EQUITY BARS ENVY'S PREEMPTION CLAIMS

For nearly a decade, ENVY has repeatedly acknowledged that Vermont has a role in determining whether to allow VY to operate after March 21, 2012, and has represented to state officials that it would not challenge the State's authority in this regard. In its complaint seeking declaratory and injunctive relief, ENVY now makes an about-face on this issue, asserting that the State has been preempted all along. Yet ENVY was perfectly content to claim the benefits of the State's action when it was convenient (or profitable) to do so. ENVY's inequitable conduct bars the Court from granting the requested relief. *See New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (equitable considerations can "dictate denial of injunctive relief"); *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 187 (2d Cir. 2010) (Declaratory Judgment Act confers on federal courts "unique and substantial discretion in

[8] Even if State officials were interested in VY having a long-term power contract, ENVY cannot argue that this was a pretext for regulating nuclear safety. *See, e.g.*, *Amended Petition of UPC Vermont Wind, LLC*, PSB Dkt. No. 7156, at 113 (Aug. 8, 2007), *available at* http://www.state.vt.us/psb/document/7156upc/7156finalorder.pdf (requiring proposed wind farm to engage in reasonable efforts to obtain such contracts to show project's economic benefit).

[9] ENVY did not address this claim at the PI hearing or in its proposed conclusions of law, so the State is presently unable to address it in depth and will respond further in post-trial filings.

deciding whether to declare the rights of litigants," and "[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations." (quotations omitted)).

A. ENVY Has Repeatedly, and Unequivocally, Recognized the State's Authority To Determine Whether VY Should Continue Operating Beyond 2012

In 2002, ENVY sought — and received — permission from the PSB to purchase VY. At that time, ENVY already contemplated a business model that included several changes to the VY plant that would require additional State approvals, including approval to operate VY after 2012. Defs.' Ex. 1014 at 140-41. ENVY further agreed that it would comply with the CPG process for those projects, including post-2012 operation. *Id.* This agreement was memorialized in an agreement with DPS ("2002 MOU"), in which ENVY "expressly and irrevocably" agreed that: (i) "the Board has jurisdiction under current law to grant or deny approval of operation of the [VY facility] beyond March 21, 2012"; and (ii) ENVY "waive[s] any claim [it] may have that federal law preempts the jurisdiction of the Board" to "renew, amend or extend the . . . CPG[s] to allow operation of the [VY facility] after March 21, 2012, or to decline to so renew, amend or extend." Pls.' Ex. 109 at 6 (¶ 12). The PSB "expressly rel[ied]" upon the 2002 MOU and adopted it in its Order approving ENVY's purchase of the VY station. Pls.' Ex. 126 at 82, 158.

In 2004, "primarily to increase revenues," ENVY sought and received PSB approval to increase power production by roughly 20%. Defs.' Ex. 1014 at 145. An ENVY representative testified to PSB that, because of the increased production, it would need new dry-cask storage units for spent fuel to operate beyond 2007 or 2008; ENVY agreed to seek state approval before building those units. *See* Defs.' Ex. 1009 at 86-89.

In 2005, ENVY sought state approval to build the new dry-cask storage units; that

approval was granted in Act 74, which ENVY proposed and supported.[10] ENVY also agreed, in another MOU, that it "will not file an action or petition based on or otherwise seek, claim, defend, or rely on the doctrine of federal preemption to prevent enforcement of its express obligations under this MOU." Defs.' Ex. 1007 at 3 (¶ 12).

In March 2008, ENVY petitioned the PSB to issue a CPG for operation of VY after March 21, 2012, and once again recognized both the PSB's jurisdiction and the need for legislative approval.[11] In March 2010, an ENVY representative testified that, in 2002, the company "made a commitment to the [PSB] to work with the Board's [CPG] process to receive approval from the State for the power uprate, dry fuel storage, and license renewal."[12] The State will show further evidence that, since 2002, ENVY repeatedly submitted to the PSB's jurisdiction to regulate non-safety areas of VY's operations, and ENVY obtained numerous benefits from the State in those proceedings.

B. ENVY's Preemption Claims Are Barred by Waiver, Laches, and Unclean Hands

1. "[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotations omitted). Parties may agree to waive preemption arguments. *Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277, 282-83 (S.D.N.Y. 1997) (citing *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003)). Under Vermont law, which governs the interpretation of the MOU, *see* 2002 MOU at 7 (¶ 16(1)), the

[10] *See* Defs.' Ex. 1046; App. 2-4; *id.* at 80 (ENVY's proposal would allow storage only "through the life of the current license through 2012" and for decommissioning thereafter); *id.* at 82-84. The State will show further evidence that ENVY heavily lobbied for this bill.

[11] *See* Defs.' Ex. 1012 at 2 (¶ 4); *see also id.* Ex. 1013 at 21 (PSB decides "the question" of license renewal).

[12] Defs.' Ex. 1014 at 140-43. In that case, ENVY sought damages for expenses incurred as a result of the failure of the Department of Energy ("DOE") to remove spent nuclear fuel from VY. The trial court ordered DOE to reimburse ENVY for the costs ENVY incurred in abiding by the State's approval processes, after ENVY explicitly argued that the State had *not* gone beyond its jurisdiction in 2005 by passing Act 74. *See id.* at 115-16, 189.

"cardinal principle" in construing any contract is "to give effect to the true intention of the parties." *In re Cronan*, 563 A.2d 1316, 1317 (Vt. 1989).

In the 2002 MOU, which was incorporated into a final PSB order, ENVY "*expressly and irrevocably*" agreed to waive "any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law." Defs.' Ex. 12 at 18 (emphasis added); *see also* Ex. 1017 at 6; Ex. 1016 at 7-8; Ex. 1018 at 13; Pls.' Ex. 109 at 6 (¶ 12).

The fact that Acts 74 and 160 require legislative approval before the PSB could extend the term of ENVY's CPG does not relieve ENVY of its unequivocal waiver. A waived right is "gone forever, and cannot be recalled or reclaimed," even if "the position of the party in whose favor the waiver operates may have changed." *Johnson v. Tuttle*, 187 A. 515, 518 (Vt. 1936); *see United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998) (waiver encompasses "all conflicts foreseeable at the time"). The parties were aware in 2002 that the Legislature could change the PSB's jurisdiction, and, as explained above, the Supreme Court has upheld a state legislature's reservation of a role for itself in licensing decisions. *See PG&E*, 461 U.S. at 215.

ENVY's conduct over the last nine years also demonstrates that its waiver should apply to any preemption-based challenge to the Legislature's authority under Acts 74 and 160. "The parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent." *Ocean Transp. Line, Inc. v. Am. Philippine Fiber Indus. Inc.*, 743 F.2d 85, 91 (2d Cir. 1984). ENVY *proposed and lobbied for* the bill that ultimately became Act 74 — which authorized a CPG for additional dry-cask storage but required legislative approval for storage of waste generated beyond March 21, 2012 — and hailed its passage as "'good news' for the plant and the employees who ran it, because, otherwise, the plant could not have continued to operate." Defs.' Ex. 1019 at 21. Similarly, in the debates over Act 160, ENVY testified numerous times before the Legislature, but did not once suggest that inserting the Legislature

into the license renewal process would violate or repudiate the 2002 MOU.[13] Until it filed this action, ENVY's conduct since 2002 has been entirely consistent with the understanding that the waiver from the 2002 MOU applied to the preemption claims ENVY now brings before this Court. ENVY thus comes to the Court with unclean hands.

Even if there were some basis for ENVY to assert that the State has repudiated the 2002 MOU by inserting the Legislature into the license renewal process — and there is not — ENVY must raise those arguments before the PSB. *See* Pls.' Ex. 109 at 7 (¶ 16) ("[A]ny disputes arising under this [MOU] *shall be decided by the Board*.") (emphasis added).[14]

2. ENVY's preemption claims are also barred by the doctrine of laches, which applies when a party "fail[s] to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right." *In re Vermont Elec. Co-op., Inc.*, 687 A.2d 883, 884-85 (Vt. 1994) (quotations omitted); *see id.* at 885 (finding six-year delay before asserting procedural violations "patently unreasonable").

Any challenge to the Legislature's involvement in licensing decisions became ripe in 2005 and 2006, when Acts 74 and 160 were enacted. ENVY deliberately chose at the time to accept the significant benefits of those decisions — namely, permission to operate through 2012 — yet it now seeks, years later, to argue that the Legislature's actions have been preempted all along. The State will adduce evidence that these were ENVY's intentional business decisions at the time. Further, the State is prejudiced by ENVY's delay. The PSB expressly relied on ENVY's commitments and representations in approving ENVY's various CPGs; the State did likewise in passing the statutes authorizing the PSB to grant those CPGs. *See* Pls.' Ex. 126 at

[13] ENVY did argue that Act 160 was unnecessary as a matter of policy, but did not suggest that it was preempted by federal law. *See* App. 171-72; 203; 227; 240-43.

[14] Forum-selection clauses "are prima facie enforceable in Vermont." *Chase Commercial Corp. v. Barton*, 571 A.2d 682, 684 (Vt. 1990).

81-82; Defs.' Exs. 1024-25; PSB Dkt. No. 6812 (2004 CPG). The cost-benefit calculations that gave rise to those decisions would have been different if the State knew that it would face litigation over the scope of its authority.

C. ENVY Is Estopped from Raising Preemption Claims

Since 2002, ENVY has made a series of promises and assertions, before the PSB, the Court of Federal Claims, and the Vermont Legislature, that it would not challenge the state's authority to determine whether to extend its CPG beyond March 2012. Those representations were relied upon. ENVY is thus judicially and equitably estopped from now arguing that the State has no authority over VY's continued operation.

1. Where a party "assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *In re Adelphia Recovery Trust*, 634 F.3d 678, 695-96 (2d Cir. 2011) (quotations omitted); *see also New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). ENVY succeeded in purchasing VY based on its "binding contractual commitment" in the 2002 MOU. Pls.' Ex. 126 at 81-82; *see also* Defs.' Ex. 1022 at 25. ENVY acknowledged that "the Board will rely on" its commitment not to bring a preemption claim and that "ENVY would be estopped from arguing in the future that the Board did not have authority to extend the CPG."[15]

ENVY also succeeded in a recent federal court case based on similar representations. *See Entergy Nuclear Vermont Yankee, LLC v. United States*, 95 Fed. Cl. 160, 189-90 (Fed. Cl. 2010) (obtaining approximately $10 million of damages related to the cost of the Vermont approval

[15] Defs.' Ex. 1018 at 13-14. *See also* Defs.' Ex. 1021 at 59-60; *id.* Ex. 1017, at 3 ("For NECNP to suggest that ENVY would make specific agreements in the MOU, ask the Board to rely on those agreements and approve the transaction, and then try to back out of those agreements by arguing preemption is an unwarranted and unsupported attack on the integrity of this company and of its representatives who negotiated the MOU and supported it before the Board.").

process for additional dry-cask storage, by arguing that the CPG proceedings "[did] not intrude on the federal government's regulation of nuclear plants from a safety and a radiological standpoint"); *see also* Defs.' Ex. 1019 at 21-22; *id*. Ex. 1020 at 18; *id*. Ex. 1019 at 2, 17, 53; *id*. Ex. 1014 at 116, 142-43.

Despite ENVY's explicit representations to multiple government entities that it would not "walk away from the commitments it has made to the Board and the Department," Defs.' Ex. 1017 at 3, ENVY now seeks to do just that. The purpose of judicial estoppel is to prevent precisely this type of action. *See, e.g.*, *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) ("[Plaintiff's] prior representation in the Massachusetts state court that it would not prosecute the state antitrust count and its subsequent repudiation of that intention . . . warrants application of judicial estoppel.").

2. Equitable estoppel also applies here. That doctrine bars a party from raising a particular argument if, "in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Neverett v. Towne*, 179 A.2d 583, 590 (Vt. 1962).

Since 2002, ENVY has profited greatly from the statutes and actions that it now claims are preempted, earning substantial profits as a result of the PSB's approval of the sale of VY to ENVY in 2002 and the PSB's decision in 2004 to allow ENVY to increase production by 20%, among other projects and modifications to the VY plant. In each proceeding, ENVY touted both its waiver of preemption and its commitment to seek future approvals from the state to continue operating beyond March 2012. *See, e.g.*, Defs.' Ex. 1029 at 13-14. ENVY also lobbied for Act 74 and acknowledged that the General Assembly would have a role in determining whether VY would operate past March 2012. Nor did ENVY question the Legislature's authority to approve

VY's continued operation in the context of Act 160. ENVY "cannot claim the benefit of statutes and afterwards assail their validity." *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917).

III. EVEN IF ACTS 74 AND 160 ARE FOUND TO BE PREEMPTED, ENVY MUST STILL OBTAIN A CPG TO OPERATE BEYOND MARCH 21, 2012, AND THE COURT MAY NOT GRANT THE INJUNCTIVE RELIEF ENVY SEEKS

Even if the Court finds Act 74 or Act 160 to be preempted, ENVY must still fulfill its obligations to obtain a CPG from the PSB for continued operation beyond March 21, 2012. The CPG requirement has been in place since 1908 and ENVY has not asserted that this requirement — which was enacted long before nuclear power was even developed — was motivated by radiological safety concerns. Thus, ENVY still must obtain a CPG from the PSB in order to operate beyond March 21, 2012. Similarly, even if the Court finds Act 74 or Act 160 to be preempted, the Vermont Legislature would remain free to adopt future legislation that prevents VY from obtaining a CPG for reasons unrelated to radiological safety. Indeed, this very prospect is a key reason why courts are hesitant to find state laws preempted based on the allegedly improper motives of particular legislators. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 383 (1968). Because any relief granted by the Court must be "narrowly tailored to fit specific legal violations," the Court cannot grant the broad injunction requested by ENVY and cannot mandate that Vermont allow ENVY to continue operating after March 21, 2012. *Mickalis Pawn Shop*, 645 F.3d at 143-44.

CONCLUSION

For these reasons, the Court should enter judgment in favor of the State.

Dated September 4, 2011, at Montpelier, Vermont.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system:

- **Defendants' Pretrial Brief**
- **Defendants' Pretrial Statement of Disputed Facts**
- **Defendants' Legislative History Appendix to Pretrial Brief (Parts 1, 2, & 3)**

The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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